United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1506

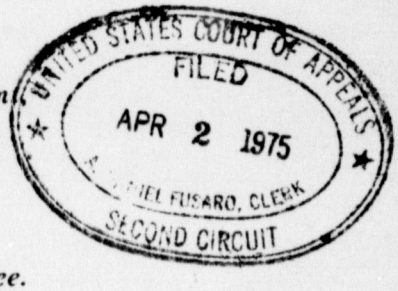
United States Court of Appeals

For the Second Circuit.

ROBERT FROSS STAPLIN,
Plaintiff-Appellant,

-against-

MARITIME OVERSEAS CORP.,
Defendant-Appellee.



On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

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Defendant-Appellee. :

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BRIEF ON BEHALF OF MARITIME OVERSEAS CORP. (DESIGNATED DEFENDANT-APPELLEE)

PRELIMINARY STATEMENT

This is an action brought by a seaman against his employer to recover damages for personal injuries sustained by him while he was working on the vessel on March 1, 1973.

The case was tried before the Honorable Richard H. Levet and a jury in March, 1974. The trial was conducted in two phases. The initial phase of the trial was concerned only with the issue of liability. That phase of the trial resulted in a jury verdict holding the shipowner liable to the seaman for damages.

The only issue in the second phase of the trial was whether plaintiff had sustained damages because of the injuries he sustained March 1, 1973 and the extent thereof.

The jury rendered a bipartite special verdict awarding the plaintiff $1,200 for pain and suffering and $2,400 for lost wages for the period March 27, 1973 through May 30, 1973.

On defendant's motion, Judge Levet reduced the award of $2,400 for lost wages to $1,135. He held that the award of $2,400 for lost wages was excessive since the jury had awarded more in lost wages than the maximum possible under his supplementary charge on the method to be utilized in computing the lost wages, i.e., by using the stipulated average earnings of $6,200 per year and the period of time that plaintiff was disabled from work, two months and six days.

The only issues presented on this appeal are the propriety of Judge Levet's charge to the jury concerning the method to be employed in calculating the lost wages and his reduction of the jury award for lost wages.

STATEMENT OF THE CASE

After having retired to deliberate on their verdict on damages, the jury requested further guidance from

the Court on how to determine lost wages. The Court's supplementary charge is set forth verbatim below:

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"THE COURT: I have your note not signed by the foreman, which reads:

'Was plaintiff paid wages while unfit for duty?'

The answer, of course, is no. That's what the claim is all about as far as past wages are concerned, and the period is only from March 27 to March 30.

I will explain to you that the proper was to calculate it would be to take an average -- an annual amount for the previous four years and allot four months and six days, I guess it is, and if you believe that's correct, and it has been proved that he was unable to work because of the accident, then you put that amount, whatever amount you come to, in the special verdict. I think I have answered it.

Is there any question now?

Do you understand, Mr. Foreman?

THE FOREMAN: Yes.

THE COURT: Is there anybody that doesn't understand?

Have I correctly stated it, Mr. Dooley?

MR. DOOLEY: Yes, your Honor.

THE COURT: Mr. Fleming?

MR. FLEMING: I believe your Honor said four months. It is two months.

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> THE COURT: I am sorry, two months is correct. I am sorry, I misspoke. It is only two months. It is from the dates I stated, the 27th of March to the 30th day of May, which means you have a few days in March and you have April and May. Two months. I'm sorry, I misspoke."

It is indisputable that plaintiff's attorney, when specifically asked by the Court whether he agreed with the charge concerning the proper method of calculating the lost wages, agreed that the Court had correctly stated it.

There is no question that the plaintiff's average earnings for the four years preceding the accident was $6,200. There is also no dispute that plaintiff was marked not fit for duty from March 27, 1973 to May 30, 1973.

All claims for future pain and suffering, future lost wages and lost overtime were eliminated from the case in the course of the trial and are not involved on this appeal.

QUESTIONS PRESENTED

1. May a plaintiff appeal from a jury instruction to which he specifically agreed?

2. Did the trial court abuse its discretion in reducing a special verdict rendered by a jury which obviously disregarded the court's instructions where the damages were to be computed on a formula basis with all elements precisely defined?

POINT I

PLAINTIFF'S COUNSEL HAVING SPECIFICALLY AGREED TO THE COURT'S CHARGE ON THE METHOD TO BE USED BY THE JURY IN CALCULATING LOST WAGES CANNOT COMPLAIN OF THE CHARGE ON APPEAL.

Rule 51 of the Federal Rules of Civil Procedure reads as follows:

> "INSTRUCTIONS TO JURY: OBJECTION. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Admittedly, this case is somewhat unusual in that the instruction to the jury which was not objected to and indeed agreed to by appellant's counsel, was given in answer to a specific question by the jury in the course of its deliberations. However, there is no reason to believe that Rule 51 does not also apply in this situation.

Where counsel for plaintiff acknowledged the propriety of the Court's instructions to the jury, he cannot complain on appeal of the giving of the instructions. Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2 Cir., 1968); Moore v. Waring, 200 F.2d 491 (2 Cir., 1952).

Neither can counsel for the plaintiff-appellant be heard to object to the introduction of the plaintiff-appellant's earnings for the four years preceding the accident. He did not object when the trial judge read them to the jury, Appellant's Appendix, Page 20A, Lines 17-20.

POINT II

THE JURY HAVING DISREGARDED THE COURT'S INSTRUCTIONS ON THE CALCULATION OF LOST EARNINGS WHICH CONSISTED OF A MATHEMATICAL COMPUTATION BASED ON TWO DEFINITE ELEMENTS, TIME AND RATE, THE COURT PROPERLY MADE THE COMPUTATION ITSELF AND REDUCED THE VERDICT TO THE PROPER AMOUNT.

It is axiomatic that trial juries have wide discretion in determining the amount of their verdicts. If the jury had rendered a general verdict in this case, there would have been no basis on which the verdict could have

been reduced. However, we are concerned with a special verdict determining the amount of lost wages sustained by plaintiff as a result of his accident. If the amount of a jury's award for lost wages is sustainable, it must conform to the Court's charge setting forth the method to be used in calculating the lost wages. Feinsinger v. Bard, 195 F.2d 45 (7th Cir., 1952).

There is no doubt that the jury was properly charged as to the basis for calculating the damages, being given both the period and the average amount to be used. The only task of the jury was to calculate the lost wages for the period which they believed the plaintiff was disabled. As pointed out above, it was obvious from its $2,400 award that the jury believed that plaintiff was totally disabled from work throughout the period involved. Judge Levet's reduction of the amount from $2,400 to $1,135 was in accordance with his charge which the jury disregarded.

In Kendall v. United Airlines, 200 F.2d 269, 271 (2 Cir., 1952), this Court was concerned with the amount of the verdict, principally because it was not clear what rate of interest the jury used in reaching its verdict. Chief Judge Swan used the following language which is applicable to this case:

> "If we could be certain as to the exact amount of interest, which the jury allowed in reaching their verdict, it might be possible to direct a remittitur and affirm the judgment for the lesser amount."

In Nachtman v. Jones & Laughlin Steel Corporation, 235 F.2d 211, 213 (3 Cir., 1956) the court used the following language in setting forth the authority and responsibility of United States Judges:

> ". . . This authority and responsibility to keep jury findings within reasoned rules and standards is an essential function of United States judges today as it long has been of common law judges. * * It stands as a great safeguard against gross mistake or caprice in fact finding."

Indeed, Judge Waterman of this Circuit set forth his views on the responsibility of judges vis a vis the amount of damages awarded by a jury in Dellaripa v. New York, New Haven & Hartford R. Co., 257 F.2d 733, 735 (2 Cir., 1958):

> ". . . However, responsibility for the amount of damages awarded does not lie exclusively with the jury - its responsibility is primary, but not final. The ultimate responsibility rests with the trial judge who may set a verdict aside. His power to set aside a verdict as excessive implies that he has a duty to do so when he conscientiously believes that the jury has exceeded the bounds of propriety. This duty should not be avoided by hiding behind the jury's verdict. Here, because we believe that the trial judge in this case did conscientiously exercise his discretion, and that he did not abuse it, we avoid reaching the issue of our power to review his exercise of discretion."

Judge Levet's reduction of the jury's excessive verdict to the amount it should have found if it had followed

the Court's instruction was a proper exercise of discretion by a trial judge.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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